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UNITED NATIONS

AT

Administrative Tribunal

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28 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 717

Case No. 759: MUSEIBES

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 18 August 1993, Hasan Mohd Museibes, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA), filed an application requesting the Tribunal, inter alia:

"(a) [To take certain preliminary and procedural measures including the production of certain documents and the hearing of witnesses];

(b) [To order his] reinstatement in [his] former post, Area Welfare Officer [AWO];

(c) [To order the issue of] a testimonial certificate acknowledging [his] achievements, donations and moral behaviour when [he] was AWO; ..., [to issue and to distribute] fieldwide a letter of apology in English and Arabic to rehabilitate [his] reputation; ..., [to sue] the guilty for slander, libel, obstructing and misleading the course of justice;

(d) [To order the payment of] 50 000 $, fifty thousand US dollars, in compensation for the moral and financial harm and damages;

(e) [To raise his] grade and step level to grade 8, step 7, which [he] should normally have gotten so far, had it not been for the biased disciplinary measures;

...

(g) ... that the investigations and testimonies be carried in such a neutral manner and place as to avoid the influence of the Administration on its staff members;

(h) [Payment of a D.S.A. (Daily Subsistence Allowance) for all the days/nights ever since [he] was transferred from Aleppo until [his] transfer back for financial and material harm, and an equal amount for moral and psychosomatic effect and harm so far and in the future."

Whereas the Applicant submitted an addendum to his application on 27 November 1993;

Whereas the Respondent filed his answer on 24 February 1994;

Whereas the Applicant filed written observations on 27 March 1994;

Whereas the Applicant submitted additional observations on 1 May 1994;

Whereas the Respondent submitted additional observations on 29 September 1994;

Whereas the Applicant submitted additional observations on 10 December 1994, 25 May, 20 June, 10 and 12 July 1995;

Whereas, on 19 June 1995, the Respondent submitted an additional statement;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 2 May 1987, as an Area Welfare Officer in the Aleppo/Lattakia Area of Syria, at grade 7, step 1, on a temporary indefinite appointment. With effect from 1 August 1990, the Applicant was transferred to the post of Area Welfare Officer, Central [Homs] Area, and with effect from 4 May 1991, to the post of Clerk B, in the Relief and Social Services Department in the Field Office, Damascus, with protected

grade and salary. With effect from 1 February 1992, the Applicant was transferred back to the Aleppo Area as an Elementary Teacher, at grade 7. The Applicant resigned, with effect from 1 October 1993.

In a memorandum dated 1 November 1987, the Applicant requested a "private meeting" with the Deputy Director of UNRWA Affairs, Syrian Arab Republic (SAR). He wanted to discuss the promotion of a Welfare Worker without his having completed her periodic report, the "discovery of hidden clothes" and "other more serious matters." In a reply dated 8 November 1987, the Deputy Director of UNRWA Affairs, SAR, noted that these matters "are not private but are professional" and indicated "they should be discussed with Field Relief Services Officer to whom I have passed your letter."

In a letter dated 18 May 1988, the Field Personnel Officer, UNRWA, SAR, informed the Applicant that confirmation of his appointment and annual increment would be deferred for three months, in view of unsatisfactory reports on his performance. In a memorandum to the Field Relief Services Officer, SAR, dated 14 June 1988, the Applicant noted that he had "never received or [been] informed of any letter of reprimand, warning or penalty" since his appointment. He requested "a written answer indicating the actual reasons that have led to the aforementioned conclusions in the letter of deferral of confirmation and annual increment, dated 18 May 1988."

In a memorandum dated 13 May 1990, to the Field Relief and Social Services Officer, the Applicant reported an altercation with another staff member. In two Notes for the Record, dated 15 May 1990, the Field Relief and Social Services Officer, SAR, recorded his concerns regarding several incidents involving the Applicant. In a memorandum dated 27 May 1990, to the Acting Director of UNRWA Affairs, SAR, the Applicant noted several accusations that had been made against him and said he had "started to lose my control over my staff." He requested that "an Investigation Committee be sent to the Area to investigate into the charges and substantiate who is to blame."

On 3 July 1990, the Deputy Director of UNRWA Affairs, SAR, wrote to the Applicant in connection with his periodic report, which had been completed on 1 July 1990. The Deputy Director noted that this report "shows an overall substandard rating with emphasis as your inability to supervise staff". He added that he felt "it is best to try you in another work environment." He informed the Applicant, "you will be transferred in the interest of the work to the post of Area Welfare Officer, Central, with effect from 1 August 1990, but with a deferment of your increment for six months." The Deputy Director advised the Applicant to "see this letter as a strong warning that if the situations which existed in Northern Area repeat themselves in Central, then I will have no choice but to consider your termination from the Agency..."

In a memorandum dated 3 March 1991, the Director of UNRWA Affairs, SAR, appointed an ad hoc Performance Review Committee to advise him after reviewing all pertinent documents, and conducting appropriate interviews, whether it considered the Applicant "competent and suitable to fulfil in the future the duties of an Area Welfare Officer..."

In a letter dated 7 March 1991, the Deputy Director of UNRWA Affairs, SAR, informed the Applicant that an ad hoc Performance Review Committee had been convened "to follow up issues concerning your periodic report" and that pending the Committee's findings, his annual increment and confirmation would be deferred. On 20 April 1991, the ad hoc Committee, after outlining several options, recommended that the Applicant be kept in his post on probation for six months or one year and that his performance be evaluated at three month intervals.

On 23 April 1991, the Field Director recorded a decision taken at a meeting between him and the Field Relief and Social Service Officer, to transfer the Applicant to a G6 post with grade protection in the Damascus Field Office, which was one of the options considered by the ad hoc Committee. In a letter dated 25 April 1991, the Acting Field Administration Officer, SAR, informed the Applicant "the Director has decided to transfer you as

from 4 May 1991 from your present post ... to the post of clerk B in the Registration and Eligibility Office with protected grade and salary."

On 2 May 1991, the Applicant requested the Director of UNRWA Affairs, SAR, to reconsider this decision. He noted that he had been transferred without being informed of the reasons, without seeing his periodic report, without "calling me to appear before the ad hoc [Performance] Review Committee to defend myself and present my witnesses and evidence" and without "even giving me the actual findings of the ad hoc Committee". In a memorandum dated 7 May 1991, the Applicant appealed to the Commissioner-General.

In a letter dated 13 May 1991, the Field Director confirmed his decision. He informed the Applicant that his transfer was "the result of an ad hoc investigation" and that he considered it to be "in the interest of the Agency." In a letter dated 30 May 1991, the Director of Personnel informed the Applicant, on behalf of the Commissioner-General, that "the decision taken by the Field is justified and should stand." He offered "to terminate your services in the interests of the Agency" and outlined the entitlements that would consequently accrue to the Applicant. On 9 June 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 10 June 1991, the Applicant wrote to the Director of UNRWA Affairs, SAR, to "kindly request that you terminate my services and compensate me ... [as outlined] ... in your letter [of 30 May 1991] as from 10 June 1991." He requested compensation of L.S. 100,000 for his transfer to Central Area, and the return of L.S. 5,000 which he had donated for program purposes. In a further memorandum, dated 1 July 1991, the Applicant noted that he had received no answer to his previous letter "asking for the termination of my services as from 10 June 1991." In a reply dated 3 July 1991, the Deputy Director informed the Applicant, "We acknowledge receipt of your letter of 1 July 1991, which we have transmitted to the Joint Appeals Board, in whose hands the case is after your appeal of 25 May 1991."

In its preliminary report dated 6 December 1991, the JAB recommended "waiving time limits for Appeal Procedures ... in accordance with area staff rule III.3 paragraph 4, and declaring [the Applicant's] case as receivable for further consideration by the Joint Appeals Board." In a letter dated 10 January 1992, the Officer-in-Charge, UNRWA, transmitted a copy of the JAB's report to the Applicant, as well as a copy of his memorandum of the same date to the Chairman of the JAB, which read, in part, as follows:

> "Without dwelling on the jurisdictional aspect, I have looked at the substance and came to the following conclusion ...
>
> (a) [The Applicant] should be transferred back to Aleppo to the temporary post of Elementary Teacher at Grade 7, with priority to be offered the first vacant post that comes up in that area ...
>
> (b) A payment ex gratia of LS 25,000 should be made to [the Applicant] towards any excessive out-of-pocket expenses he may have incurred over and above those which would normally apply in the case of transfers ..."

In a letter dated 15 January 1992, the Applicant was informed that he would be transferred to Aleppo, with effect from 1 February 1992, and paid LS 25,000. On 22 January 1992, in a memorandum to the Chairman of the JAB, the Applicant welcomed the transfer back to his home town but expressed continuing reservations and questions concerning (a) the fact that the JAB "has not dealt with the substance of my appeal, and has not told me the reasons of my disciplinary punishment," (b) the consequences of deferral of annual increments on his grade level; and (c) "the immense financial and material damage and loss," noting the amount he had received as "insignificant and worthless."

In a letter dated 23 February 1992, the Director of UNRWA Affairs, SAR, responded to several issues raised by the Applicant, noting that the sum of 25,000 pounds seemed "appropriate" and would

not be augmented, and that the annual increment deferrals had not been at issue in the appeal and therefore "no action is contemplated to change your status."

On 16 March 1992, the Applicant requested the JAB to consider the substantive merits of his appeal and to grant him "access to all reports of investigations and testimonies which led to my transfer from Aleppo and Homs." On 14 April 1993, the JAB adopted its report. Its recommendation reads as follows:

> "... the Board unanimously makes its recommendations that:
>
> (a) This appeal be dismissed and,
>
> (b) The Administration's decision be upheld with a view to ascertaining that the ex-gratia payment of LS 25,000.00 was adequate and the post offer is properly followed up to finalize reconciling the status of the Appellant under applicable Area Staff Rules and Regulations."

On 13 May 1993, the Commissioner-General, UNRWA, transmitted a copy of the JAB report to the Applicant and informed him, inter alia:

> "... I accept the recommendation and your appeal, therefore, stands dismissed.
>
> The Board has also recommended that the Administration ascertain whether the ex-gratia payment of LS 25,000.00 is adequate. I must advise you that since this amount was paid to you 'ex-gratia', i.e. without any obligation to do so, I do not believe that such an exercise is required. Finally, the Board has recommended that the question of a post to be offered to you be properly followed up. I will, accordingly, ask the Director of UNRWA Affairs in the Syrian Arab Republic to look into this and advise you of the results in due course."

On 18 August 1993, the Applicant filed with the Tribunal the application referred to earlier.

In a letter dated 1 September 1993 , the Applicant informed the Director of UNRWA Affairs, SAR, "I am, under undue pressure and unbearable prejudice, compelled to tender my resignation as of 1 October 1993," citing a number of issues. In a letter dated 23 September 1993, the Officer-in-Charge, UNRWA, SAR, acknowledged the Applicant's resignation, noting "the Agency does not accept the various allegations made by you in connection with your decision to separate from the Agency's service."

Whereas the Applicant's principal contentions are:

1. Ever since the Applicant reported the discovery of hidden clothing, he has been subjected by the Administration to a campaign against him.

2. The Applicant was transferred as a result of an investigation in which he did not have an opportunity to defend himself, and a resulting report to which he was not given an opportunity to respond.

3. The action taken by the Administration to transfer the Applicant back to Aleppo, with priority for placement, and the ex gratia payment made to him do not adequately compensate him for the injury he suffered.

Whereas the Respondent's principal contentions are:

1. The Applicant's claim is moot. By transferring the Applicant back to Aleppo, with priority of placement and an ex gratia payment of LS 25,000, the Respondent has provided the relief requested. The Applicant is seeking punitive measures, which are not within the scope of administrative procedures.

2. The decision to transfer the Applicant was entirely proper and within the Respondent's discretion. The Applicant has presented no evidence that the decision was motivated by prejudice or constituted an abuse of discretion.

The Tribunal, having deliberated from 7 to 28 July 1995, now pronounces the following judgement:

I. The Tribunal notes that the Applicant asks for a number of additional documents including his personal file. He has now received it, after some delay. In the view of the Tribunal, the other documents and the oral hearing he has requested are not necessary for the Tribunal to decide the case.

II. The main complaint of the Applicant appears to be that he was not informed properly, or at the right time, why he was being transferred, first from Aleppo to Homs and again from Homs to Damascus. In a letter dated 2 May 1991, to the Director of UNRWA Affairs, he expressed his dissatisfaction over having been transferred without: (1) mentioning to him the reasons for the transfer, (2) showing him the periodic reports on his work, (3) calling him to appear before the ad hoc committee set up to assess his usefulness to UNRWA and (4) informing him of the findings of the committee. He pursued his attempts to discover what he thought to be the "substance proper" behind the action of the Respondent in transferring him twice in less than a year. As time passed, his accusations against many officials in UNRWA increased and he felt himself a victim of malice and intrigue. The JAB was presented with some of these matters, and it briefly commented that it was not a "forum for settling personal vendettas".

III. The Tribunal examined the plethora of representations made by the Applicant, quite frequently in instalments. His suspicion that some person or persons, dissatisfied with the discovery of their wrongdoing i.e. theft of some clothes meant for relief purposes, and/or perhaps envious of some donations he had offered, manipulated his transfer with a view to getting rid of him from UNRWA altogether, is ill founded. This is so, despite the fact that there was much ill-feeling among the people with whom he was working.

IV. The evidence before the Tribunal establishes that the difficulty that arose between the parties was essentially due to the way each of them considered the Applicant's two transfers. The Applicant thought of them a disciplinary measure while the Respondent treated them both as a warning and as an effort to indicate to the Applicant how best his services could be used for the benefit of UNRWA. This fundamental difference in approach colours the interpretations given by the parties to the various developments that took place in this case. The Respondent was firm in his view that transfers and postings could be made entirely at his discretion and in the interest of the organization and that he had, in this instance, "protected the Applicant's grade and salary." The Applicant on the other hand, strongly felt that the transfer with apparent reduction in grade, even with protected salary, implied a concealed disciplinary measure.

V. The record shows that the Applicant was well aware of the growing dissatisfaction in the Agency with his work and attitude. Not only was his increment withheld on several occasions, but he was told, in no uncertain terms, that unless his performance improved, the Respondent would "have no choice but to consider your termination from the Agency". This was communicated to him on 3 July 1990. In addition, several strong warnings were given to him.

VI. The concern of the Respondent about the future of the Applicant was evident when the Director of UNRWA Affairs, Syrian Arab Republic, faced with uneven and at times contradictory reports on the Applicant's work, appointed on 3 March 1991, an ad hoc Performance Review Committee. This Committee was asked to "review all documents in [the Applicant's] file, to interview former and present supervisors of [the Applicant] and to give me ([Director of UNRWA Affairs], Syria) a recommendation mainly on whether the Committee considers [the Applicant] competent and suitable to fulfil

in the future the duties of an Area Welfare Officer, keeping in mind the obvious requirements of a person in such a post to be co-operative and able to work with the full confidence of supervisors, colleagues, subordinates and the Palestinian Refugee clients". The establishment of this Committee was, in the view of the Tribunal, a serious attempt by the Respondent to assess the Applicant's capacity and cannot be confused with any actual or contemplated disciplinary measure. The Committee was an entirely internal body established to obtain an accurate and up-to-date assessment of the Applicant's performance and his future potential. The Tribunal notes that the Applicant did not appear or give evidence before the Committee. Moreover, it appears that he was not given an opportunity to comment on the report of the Committee after it was issued and this constituted a procedural irregularity.

VII. The ad hoc Performance Review Committee met on 20 April 1991, to analyze the evidence of the many witnesses whom it had examined and to finalize a recommendation. After considering various possibilities, it suggested that the Applicant should be "on probation for another six months or a year and have proper detailed evaluation during this period".

Action was accordingly taken and the Applicant was informed on 25 April 1991 that he would be transferred to the Field Office at Damascus with "protected grade and salary". The Applicant lodged an appeal with the JAB.

VIII. Following the JAB's initial determination that the Applicant's appeal was receivable, on 10 January 1992, the Officer-in-charge, Headquarters, informed the Applicant that he would be transferred back to Aleppo "to the post of Elementary Teacher at Grade 7, with priority to be offered the first vacant post that comes up in that area (as an English Teacher, preparatory cycle, at Grade 9)". The Applicant was also given an ex-gratia payment of LS

(Syrian pounds) 25,000 "towards any excessive out-of-pocket expenses he may have incurred over and above those which would normally apply in the case of transfers".

The Applicant expressed appreciation of these decisions but stated in a memorandum of 22 January 1992, to the Chairman of the JAB, that the JAB had not dealt with "the substance of my appeal and has not told me the reasons of my disciplinary punishment". He also wanted to know what would happen to his increments which had been withheld and indicated the ex-gratia payment of LS 25,000 was "insignificant and worthless".

IX. The JAB reviewed these developments and concluded that the Applicant's appeal should be dismissed. It recommended in April 1993 "that the Administration's decision be upheld with a view to ascertaining that the ex-gratia payment of LS 25,000 was adequate and the post offer is properly followed up to finalize reconciling the status of the [Applicant] under applicable area Staff Rules and Regulations". The Respondent interpreted this recommendation as a request for an increase in the ex-gratia payment and refused to accede. The Respondent confirmed his view that all the transfers of the Applicant had been made in the interest of the Agency. The Applicant resigned on 1 October 1993, apparently still dissatisfied, even though his grade seemed to have been raised and increments allowed on the basis of recent reports on his work.

X. The Tribunal considers that the Respondent's actions in transferring the Applicant from place to place were taken in good faith and were not tainted by prejudice or any other extraneous factors. On the other hand, the Respondent's failure to share the findings of the ad hoc Performance Review Committee with the Applicant, and to give him an opportunity to respond to them, was unfair to the Applicant.

The Tribunal notes that if the Respondent had "looked at the substance" of the case more carefully at an early stage, much of the

complication that followed could have been avoided, and the Applicant would have been spared some difficulties and uncertainty.

There is evidence that the Applicant incurred financial losses attendant on frequent transfers at short intervals. In the circumstances and in view of the procedural irregularity noted above, the Tribunal considers that the Applicant is entitled to some monetary relief, which the Tribunal assesses at US$2,500.

XI. In the light of the above, the Tribunal orders the Respondent to pay the Applicant a sum of US$2,500.

All other pleas are rejected.

(Signatures)

Samar SEN
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

Geneva, 28 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary

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21 November 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 718

Case No. 808: GAV3HIN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, on 26 September 1994, Vladimir Gavshin, a former staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

"(a) To rescind the decision of the Secretary-General not to extend the Applicant's contract beyond 30 April 1993;

...

(e) To order the Applicant's immediate reinstatement with reasonable consideration at the earliest opportunity for a permanent appointment;

(f) To order that all adverse evaluations on his competence outside the scope of his official performance evaluations be removed from the Applicant's official file;

(g) To order payment of full salary and applicable allowances and benefits from the date of the Applicant's separation from service to the date of reinstatement;

(h) To award the Applicant additional appropriate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the

Applicant to his career and reputation as a result of the Respondent's actions or lack thereof;

(i) To fix, pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at 3 years' net base pay in view of the special circumstances of the case;

(j) To award the Applicant, as costs, the sum of $2,000.00."

Whereas the Respondent filed his answer on 6 February 1995;

Whereas the Applicant filed written observations on 22 March 1995;

Whereas, on 6 November 1995, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 10 April 1985, on a six-month fixed-term appointment, at the P-3, step IV level, as a Law of the Sea Officer in Kingston, Jamaica. His appointment was extended repeatedly, for periods varying from one to twenty-two months, through 30 April 1993, when he separated from service upon the expiration of his last appointment.

The Applicant's initial Letter of Appointment stated that he was "on secondment" from the Government of the Union of Soviet Socialist Republics (USSR). Subsequent Letters of Appointment through January 1992 also contained this provision. Thereafter, his Letters of Appointment contained no reference to secondment.

In a letter dated 7 May 1990, the Deputy Permanent Representative of the USSR to the United Nations submitted to the Assistant Secretary-General, Office of Human Resources Management (OHRM), the names of three candidates "to replace [the Applicant], who has been serving with the Organization on secondment from the Soviet Government ... on a fixed-term appointment which expires on 30 June 1990." In a letter dated 17 May 1990, the Special Assistant to the Special Representative of the Secretary-General for the Law

of the Sea (the Special Representative) advised the Director of the Recruitment and Placement Division, OHRM, that it would be "useful if these ... candidates could be interviewed and also any others who may have the required qualifications for the post." He therefore requested an extension of the Applicant's contract for a period of three months. This extension was granted, with the consent of the USSR Government, through 30 September 1990.

In a memorandum dated 24 September 1990, the Special Assistant to the Special Representative informed the Director of the Recruitment and Placement Division, OHRM, "that two important projects in which [the Applicant] has been specially involved are still in progress and that a reasonable period would be needed for him to complete these two assignments." He noted that "it would be preferable that we retain [the Applicant's] services and defer the recruitment of his replacement for the present". He further stated that the Permanent Mission of the USSR would not object to the Applicant's continuation for another one year period. The Applicant's appointment, on secondment, was consequently extended, through 30 September 1991.

On 27 June 1991, the Applicant requested that his fixed-term appointment be extended beyond its expiration date. On 12 July 1991, the Special Representative informed the Assistant Secretary-General, OHRM, that his office had no objection to the requested extension. He noted, however, that as the Applicant was on secondment, the approval of his government would be required. He added that he would request a one year extension of the Applicant's appointment.

On 2 November 1991, a Senior Personnel Officer, OHRM, advised the Applicant that OHRM had approved the extension of his fixed-term contract through 30 September 1992, subject to "receipt by the Organization of written confirmation that you have severed any ties you may have had with your Government." He further stated, "should you not wish to sever ties with your Government at this time, and

wish to be considered for a fixed-term appointment on the basis of the secondment, please notify us (...), so that we may seek the concurrence of your Government to such an appointment." In a reply dated 22 November 1991, the Applicant advised the Senior Personnel Officer that he had severed any ties with his Government.

In a letter of the same date, the Applicant advised the Permanent Representative of the USSR to the United Nations, "In view of the fact that the United Nations has offered me an extension of my present appointment, I am hereby submitting my resignation from the government service."

In a letter dated 29 February 1992, the Senior Personnel Officer, OHRM, informed the Applicant that the extension of his contract was being prepared. He further noted:

> "I have taken note of your voluntary resignation from Government service. In this regard I must inform you that your resignation does not obligate the United Nations Organization to retain your services at the end of your current fixed-term appointment nor does it oblige the Organization to either grant you a probationary or permanent appointment at the end of your current fixed-term appointment."

In a Note for the File, dated 19 August 1992, the Administrative Officer, Office of Legal Affairs (OLA), which was responsible for the Kingston Office in 1992, recorded that the Applicant had telephoned him to say that he had recently been informed, by the Director of the Division of Ocean Affairs and the Law of the Sea (DOALOS), that his contract, which was due to expire on 30 September 1992, would be extended only until the end of the year. The Applicant asked whether this decision was final. He was advised that it had been made by the Director, DOALOS, who had explained that it was "based on a number of factors not the least of which was the restructuring of the Organization that was currently underway, and the need to free up posts for this purpose."

In a memorandum dated 22 December 1992, the Administrative Officer, OLA, noted that the Applicant had "been actively seeking other post openings with the Organization" and requested a two month extension of his appointment through 28 February 1993, "in order that we may bridge the gap that would otherwise occur between posts." On 19 March 1993, another Administrative Officer, OLA, requested "a second and final two-month extension of [the Applicant's] fixed-term appointment effective 1 March through 30 April 1993." He noted that, after this date, the post encumbered by the Applicant would be considered for redeployment.

On 27 April 1993, the Applicant filed a complaint with the Panel on Discrimination and Other Grievances (the Panel on Discrimination), claiming that "I have never received reasonable consideration for conversion to a probationary or permanent appointment." On 30 April 1993, the Applicant submitted a request to the Staff Administration and Training Division, OHRM, for "conversion of my fixed-term appointment to a permanent appointment with retroactive effect."

On 30 April 1993, the Applicant separated from service.

In a letter dated 21 May 1993, the Applicant requested the Secretary-General to review the decision to separate him from service. On 30 July 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 30 August 1993, the Coordinator of the Panel on Discrimination informed the Director of Personnel, OHRM, of its conclusions and recommendations which read as follows:

"III. CONCLUSIONS

14. The Panel believes that in view of [the Applicant's] eight years of fully satisfactory service he had an expectancy of continuing employment with the Organization. Further, although he can not be considered at fault for not applying for a career appointment immediately after

completing five years of fully satisfactory service, he did, in fact, apply for a conversion of his fixed-term appointment to a career appointment later (...). There is no evidence that this request was given any consideration.

15. OHRM's request for [the Applicant's] resignation from Government service was not made with the intention of considering him for a career appointment, which makes the Panel question as to whether that request was made in good faith. In having complied with OHRM's request, [the Applicant] has suffered injury by losing the opportunity of reemployment with his Government as well as pension and other benefits.

16. It is the Panel's opinion that, prior to the resignation request, the administration had an obligation to explain to the staff member its implications vis-à-vis career possibilities at the UN.

IV. RECOMMENDATIONS

17. The Panel recommends that:

a. [The Applicant] be reappointed effective 1 May 1993;

b. Pursuant to GA resolution 37/126, para. 4, [the Applicant] be immediately and retroactively considered for a career appointment."

In a reply dated 8 February 1994, the Officer-in-Charge, Staff Administration and Training Division, OHRM, advised the Coordinator of the Panel on Discrimination as follows: "I note that your report does not contain any evidence of prejudice or discrimination against [the Applicant] but highlights what the Panel perceived to be administrative shortcomings". Since these were being considered by the JAB in the context of the Applicant's appeal, it "would be inappropriate for OHRM to make any further comments on this matter."

In the meantime, in a memorandum dated 13 December 1993, the Director, DOALOS, informed the Administrative Officer, OLA, in connection with the Applicant's appeal to the JAB, that "the

discrepancy between the high ratings given to [the Applicant] in his performance evaluation reports (PER) and his actual performance" could be explained by his secondment status. He claimed that the system of PERs, "as customarily applied to Soviet nationals, was skewed" by their rotation and that their PERs were "inevitably always positive and favourable" as "a negative performance rating would, under the then prevailing climate, have prompted a political dispute." He claimed that the Applicant's ratings were not justified by his performance.

The JAB adopted its report on 3 May 1994. Its conclusion and recommendation read as follows:

> "18. The Panel concludes that Appellant was denied the reasonable consideration and due process to which he was entitled.
>
> 19. Basing itself on the considerations of the UNAT in the cases of Vitkovski and Rylkov (Judgement No. 559) and on the parallels which can be drawn between this case and the 'flawed procedures and irregularities' of theirs, the Panel recommends that Appellant be paid 18 months of his net base salary as of the date of his separation from the Organization.
>
> 20. In arriving at its conclusion and recommendation, members of the Panel were perfectly aware that many supervisors give staff members ratings of mainly A (excellent) or B (very good), with an occasional C (good), on their PERs. This is a long-standing practice. The Panel recalls, however, that the current PER system was introduced, according to ST/AI/240 of 3 January 1977, 'with a view to ensuring a fair, consistent and objective assessment of a broad range of the staff member's performance and abilities and to eliciting specific information that will contribute to the staff member's career development.' It appears that the Administration takes one position in principle, in general and in public and ignores it in a specific case in private - as it has done here. Either the PER exercise is a valid and meaningful exercise, or it is not. Guided by Tribunal judgements in similar situations, the Panel has - for the

purposes of this case - taken the position that PERs are valid and meaningful. If it has erred, then the staff at large, as well as members of the various JAB panels, should be informed accordingly."

On 13 July 1994, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and advised him as follows:

"The Secretary-General has examined your case in the light of the Board's report and has taken note of its conclusion that you were denied the reasonable consideration and due process to which you were entitled in respect of consideration for a career appointment. The Secretary-General has decided to accept the recommendation of the Board that you be paid 18 months of your net base salary as of the date of your separation from the Organization".

On 26 September 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Upon completion of five years of continuous good service, the Applicant became entitled to, yet was unfairly denied, every reasonable consideration for a career appointment. This constituted a violation of his contractual rights.

2. The Respondent's decision to refuse the Applicant reasonable consideration for a permanent appointment was tainted by improper motives and by capricious, extraneous and prejudicial influences.

3. Although the Respondent accepted the recommendations of the JAB and granted the Applicant compensation, a miscarriage of justice was committed by failing to recognize that the only appropriate remedy in this instance is reinstatement and consideration for a career appointment.

Whereas the Respondent's principal contentions are:

1. The Applicant was employed on a fixed-term contract which expired on its terms.

2. The Applicant's performance demonstrated his unsuitability for a career appointment and for any extension of his fixed-term appointment.

3. The Applicant has been fully compensated for the procedural irregularities that occurred.

The Tribunal, having deliberated from 2 to 21 November 1995, now pronounces the following judgement:

I. In the aftermath of the Tribunal's pronouncements on secondment, the Applicant was told, on 2 November 1991, that the award to him of a new fixed-term appointment would be subject to receipt by the Organization of written confirmation that he had severed his ties with his Government. He was also told that if he did not wish to sever his ties with his Government and wished to be considered for a fixed-term appointment on the basis of his secondment, he should notify the Organization so that it might seek the concurrence of his Government.

The Applicant severed his ties with his Government. He was then informed that such severance did not place an obligation on the Organization - either to retain his services at the end of his then current fixed-term appointment or to grant him a permanent appointment.

II. The Applicant was informed in August 1992, by the Administrative Officer, OLA, that his contract would not be extended beyond the end of 1992, one of the reasons being that the Organization was being restructured. Hence, there was a necessity

to free-up posts for this purpose. The Applicant was told to make efforts to obtain a post within the system and that he would be helped to obtain interviews with OHRM.

On the basis of this interchange, the Applicant might well have thought that he was not being abandoned, that he was, in fact, being considered for further appointment, if the circumstances, including his performance, permitted such an appointment. A memorandum dated 13 December 1993, from the Director, DOALOS, discloses that performance evaluation reports (PERs) for Soviet nationals were always positive and favourable but that this accurately reflected the situation only in some cases. The Director says it did not do so in the Applicant's case, and that his PERs which showed overall "a very good performance" were not justified by the quality of his performance.

This practice existed apparently for political reasons. As far as the Applicant was concerned, there was also, according to the Director, DOALOS, the reason that the signatory of the PER was at Headquarters and was not in a position to deal with the quality of the Applicant's work in Kingston. However, any question relating to the quality of the Applicant's performance should have been brought to his attention when he was asked to sever his ties with his government. But this was not done.

III. Whatever his true status in relation to secondment, the Applicant was not informed, until after he had severed relations with his Government, of the Organization's views of its obligations to him in regard to re-appointing him. He thus lost any contractual right or opportunity that he might have had to further employment in his Government.

The Applicant was then told that his appointment would not be extended because of restructuring within his Department. This, of course, was not the real reason. As subsequently disclosed, in the memorandum of 13 December 1993 referred to above, the real reason

was disapproval of the Applicant's performance. He was thus misled by the Administration and he was never given the kind of consideration to which he was entitled. He had served the Organization faithfully for over eight years, since 1985, and his PERs were, as far as he could tell, uniformly positive. He was entitled to expect that he would receive the fair consideration due to him.

IV. The Respondent concedes that proper procedures were not followed. He says that there is no basis for the supposition that, had proper procedures been followed with respect to the completion of the Applicant's PERs, and the consideration to which he was entitled for a career appointment, he would have been recommended for an extension of his fixed-term contract.

V. It is not possible, of course, to know whether the Applicant would have obtained a further appointment or a career appointment, after proper consideration. This, however, is not the issue. The real point is that the Applicant, after having been misled, was never, in a real sense, afforded the opportunity to receive either appointment.

The Tribunal considers that the Applicant's treatment by the Administration in this case fell short of the standards to which it is required to adhere.

VI. The Tribunal recognizes the rationale for the Joint Appeals Board's (JAB) recommendation on damages, and has approved it in other cases involving similar issues. However, the Tribunal's independent assessment of this case has led it to conclude that the case presents a more extensive violation of the rights of the Applicant than the Vitkovski and Rylkov cases cited by the JAB. Here, the level of injury must be considered greater.

VII. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant the amount of six months of his net base salary, at the rate in effect on the date of his separation from service, in addition to the 18 months he has already received, in accordance with the Secretary-General's decision of 13 July 1994.

VIII. All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
President

Francis SPAIN
Member

Mayer GABAY
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/719
21 November 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 719

Case No. 799: KARTSEV

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas at the request of Vladimir Petrovich Kartsev, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 5 June and 15 July 1994, the time-limit for the filing of an application to the Tribunal;

Whereas, on 15 July 1994, the Applicant filed an application containing pleas which, in part, request the Tribunal:

"(a) To find and rule ... that the unilateral breach of [his] contract [of employment of 16 July 1991] by the Administration was arbitrary and capricious;

(b) To find and rule, alternatively, that, ..., the Administration wrongly decided not to extend the Applicant's fixed-term appointment;

(c) To find and rule that the decision ... that the Applicant be considered on secondment was wrongful ...;

(d) To find and rule that the decision ... not to recognize the Applicant's entitlement to a three-year contract, or, alternatively, not to extend the Applicant's fixed term appointment, was flawed by the intrusion of prejudice and other extraneous factors and marred by irregularities in procedure;

(e) To find and rule that the Joint Appeals Board erred ... in failing to find that the Applicant was ... entitled to immediate reinstatement and reimbursement of lost earnings for the period since his separation;

(f) To order the Applicant's immediate reinstatement at the D-2 level with [appropriate] payment of full salary and applicable allowances and benefits ... from the date of his separation from service to the date of reinstatement;

(g) To award the Applicant additional appropriate compensation ... for the actual, consequential and moral damages suffered ...;

(h) To fix, pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at two years' net base pay ...;

(i) To award the Applicant, as costs, the sum of $2,500."

Whereas the Respondent filed his answer on 15 March 1995;

Whereas the Applicant filed written observations on 28 June 1995;

Whereas, on 6 November 1995, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant, a national of the former Union of Soviet Socialist Republics (USSR) entered the service of the United Nations on 11 November 1989, on a two-year fixed-term appointment, at the D-2 level, as Director of the Publishing Division, Department of Conference Services (DCS). His appointment was subject to the special condition that he was "on secondment from government of USSR".

On 12 July 1991, a Personnel Officer, Office of Human Resources Management (OHRM), informed the Applicant that "based on the needs of the Organization and your performance, the Assistant Secretary-General for Human Resources Management has approved the

recommendation of the Department of Conference Services that you be offered an extension of your fixed-term appointment from 11 November 1991 through 10 November 1994, subject to medical clearance". She also asked the Applicant whether he preferred that his contract be extended on secondment from his Government. In a reply dated 16 July 1991, the Applicant accepted the offer, stating: "Not being a state employee, I am not interested in benefits offered by the secondment system. I would accept secondment only in the case where my opportunity to serve the U.N. would be linked unconditionally with my service on a secondment basis."

On 23 August 1991, the Personnel Officer informed the Applicant that the Assistant Secretary-General for Human Resources Management had again reviewed, with the Under-Secretary-General for Conference Services and Special Assignments, the decision to extend his contract and, "based on the needs of the Organization and [his] service record", had decided to offer him a one-year extension "on a secondment basis, from 11 November 1991 through 10 November 1992." On the same date, the United Nations wrote to the Permanent Mission of the former USSR to the United Nations, asking for the Government's agreement to extend the Applicant's appointment on secondment.

On 4 September 1991, the Permanent Mission of the former USSR consented to the extension of the Applicant's secondment for one year. The Applicant was offered a fixed-term appointment for one year. The Letter of Appointment stated as a special condition that:

> "This is a fixed-term appointment on secondment from Government service. The conditions governing appointments with the United Nations are set out in this Letter of Appointment. The conditions governing your right to return to Government service are specified in the communication dated 4 September 1991 from the Permanent Mission of the Union of Soviet Socialist Republics to the United Nations which is attached to this Letter of Appointment. By signing this Letter of Appointment, you specifically acknowledge that you have agreed to serve the United Nations on secondment

from the service of your Government on the conditions specified in this Letter of Appointment and its attachment."

On 17 September 1991, the Applicant wrote to the Assistant Secretary-General for Human Resources Management, asking him to confirm the terms of the original offer of a three year extension of his appointment. In his reply, dated 8 October 1991, the Assistant Secretary-General for Human Resources Management stated that since the Applicant's appointment was at the D-2 level, the matter of its extension was subject to consultation with the Executive Office of the Secretary-General, which had decided to grant him a one year extension.

On 23 December 1991, the Applicant wrote to the Secretary-General, asking him to "kindly reconsider my contractual situation, as a private citizen of Russia and not on alleged secondment from the Government ... and authorize the extension of my fixed-term appointment for three years ... to 10 November 1994." On 27 January 1992, the Assistant Secretary-General for Human Resources Management informed the Applicant that the initial offer of appointment had been sent to him "in error ..., before the necessary consultations with the Executive Office of the Secretary-General." He regretted the confusion that might have been caused. As regards the matter of secondment, he stated: "Based upon your statements, the Organization was correct in offering you an appointment on a secondment basis".

On 23 October 1992, DCS recommended a one-year extension of the Applicant's contract. Pending a decision on that recommendation, the Applicant was given an interim extension, from 11 November 1992 to 31 December 1992, also on secondment from Government service. It was signed by the Applicant on 13 November 1992.

On 17 December 1992, the Under-Secretary-General for Administration and Management wrote to the Secretary-General, as follows: "I understand that in connection with the Secretary-General's recent approval of the restructuring of the Office of

Conference Services, Department of Administration and Management, the post of Director, Publishing Division, is to be eliminated". He therefore recommended that the Applicant's appointment be extended for a final three month period, through 31 March 1993. The last Letter of Appointment does not contain any reference to secondment.

On 26 January 1993, the Applicant requested the Secretary-General to review the decision not to extend his appointment beyond 31 March 1993. On 15 March 1993, he lodged an appeal with the Joint Appeals Board (JAB) requesting a suspension of action on the decision not to extend him. On 23 March 1993, the JAB recommended a suspension of action to permit consideration of the substance of the appeal while the Applicant was still a staff member. The Secretary-General did not accept this recommendation. The Applicant separated from service on 31 March 1993. He was granted a Special Service Agreement as a consultant during April 1993.

The JAB adopted its report on 11 November 1993. Its considerations and recommendation read as follows:

> "Considerations
>
> 14. Having agreed with the Appellant that (a) as of 16 July 1991 he had a valid contract with the Organization for a three-year extension to his fixed-term appointment and, (b) the Administration erred in deciding that he was on secondment from his Government, the Panel, nevertheless, noted that he did not appeal in a timely fashion after receipt of [the Assistant Secretary-General for Human Resources Management's] letter of 27 January 1992, nor did he offer any grounds which would justify a waiver of the time-limits. The Panel agreed, therefore, with Respondent that that part of the appeal dealing with these issues was not receivable.
>
> 15. The Panel then considered the more recent decision not to extend Appellant's fixed-term appointment beyond 31 March 1993. The Panel noted that this decision was based on a restructuring of the then Department of Conference Services and that the Secretary-General has a wide degree of discretion in making such organizational arrangements. It agreed that there was no basis to Appellant's claim that he

was denied due process because he was not given the opportunity to comment on or review the restructuring decision. It also agreed that he had failed to produce any evidence that the decision to abolish his D-2 post was based on anything but organizational considerations.

16. Given Appellant's qualifications and performance, the Administration could well have made a greater effort to place him at the D-1 level as he had requested. It had, however, no obligation to do so. Nor, given the clearly stated conditions of fixed-term appointments - signed by Appellant on several occasions, did it have any obligation to extend his appointment at the D-2 level, once the post of Director, Publishing Division ceased to exist.

Recommendation

The Panel recommends that the appeal be rejected."

In his dissenting opinion, one member of the JAB recommended that "the Appellant be compensated by paying him his net base salary for 19 months and 10 days covering the unfulfilled term of his original three year contract from 1 April 1993 to 10 November 1994 in accordance with the jurisprudence of the Tribunal in Judgements No. 106: Vasseur (1967), No. 195: Levcik and No. 338: Moser (1987)."

On 7 December 1993, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the majority recommendation and the dissenting opinion.

He has noted the Board's finding that certain issues contained in your appeal are not receivable by the Board. In regard to the issue which was considered receivable, he has noted the Board's conclusion that the Secretary-General had no obligation to extend your appointment beyond 31 March 1993.

The Secretary-General has decided to accept the recommendation of the Board that your appeal be rejected. The Secretary-General has accordingly decided to take no further action in your case."

On 15 July 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's initial offer of a three year extension of the Applicant's appointment and his acceptance thereof constituted a legally binding contract.

2. The Respondent's unilateral breach of that contract was arbitrary and void.

3. The Respondent's offer of a one year extension on a secondment basis was wrongful.

Whereas the Respondent's principal contentions are:

1. The Applicant's claims concerning the initial offer of a three-year extension of his appointment are time-barred.

2. The Applicant's claims concerning the determination of his secondment status are time-barred and contradicted by the Applicant's own actions.

3. The Applicant accepted a one-year extension of his appointment and is, therefore, estopped from challenging it now.

4. Reorganization of an office falls within the discretionary powers of the Secretary-General and can only be challenged if the decision is tainted by prejudice or improper motive.

5. The Applicant had neither the right nor any expectancy of continued employment beyond the expiry of his fixed-term appointment.

The Tribunal, having deliberated from 2 to 21 November 1995, now pronounces the following judgement:

I. This is an appeal from a decision dated 7 December 1993, by the Secretary-General, accepting the Joint Appeals Board (JAB) recommendation to reject the Applicant's appeal.

The Applicant claims that the Respondent's initial offer of a three-year extension of his appointment and his acceptance of that offer on 16 July 1991, constituted a legally binding contract. The subsequent offer of a one year extension, on a secondment basis, is therefore alleged to have been wrongful and to have constituted a partial fulfilment of the original three year contract. The Applicant further argues that the Respondent's decision not to extend his fixed-term appointment was based on the intrusion of prejudice and other extraneous factors and was marred by irregularities in procedure.

II. Regarding the validity of the Respondent's offer of July 1991, the Respondent claims that this offer was made erroneously, and that the Applicant was informed, on 23 August 1991, of the decision to offer him a one-year extension of his appointment. Following the Applicant's request for clarification, the Administration responded, on 8 October 1991, that since he held a position at the D-2 level, his appointment was subject to consultation with the Secretary-General. As a result thereof, it had been decided to grant him a one year extension. At no time, after 23 August or 8 October 1991, when the Applicant had received a clear communication of that decision by the Administration on the extension of his appointment, did he seek a timely administrative review of the decision. Instead, on 25 October 1991, he signed, without qualification, the Letter of Appointment which provided for a one year extension. By this formal act, the Applicant may be taken to have acquiesced in the situation.

III. Staff rule 111.2(a) of the United Nations Staff Regulations and Rules provides, inter alia:

> "A staff member wishing to appeal an administrative decision, pursuant to staff regulation 11.1, shall, as a first step, address a letter to the Secretary-General, requesting that the administrative decision be reviewed; such a letter must be sent within two months from the date the staff member received notification of the decision in writing."

Following a request by the Applicant to the Secretary-General to authorize the three year appointment, the Administration stated, by letter of 27 January 1992, that the initial offer had been in error. The Tribunal finds that, at the very latest, it would be from this date, 27 January 1992, when the Applicant received an unequivocal written response from the Secretary-General, that the time limit for an appeal had to be measured. Having failed to act within a two month period, from 27 January 1992, the Tribunal concludes that the Applicant's plea on this issue is time-barred.

IV. The Applicant claims that the Respondent's decision to consider him on secondment negatively influenced his decision-making when determining whether to grant him a three year extension. However, based on the Applicant's conduct, it is difficult to see how he can substantiate this claim. Upon being informed of his one year extension, the Applicant immediately consulted with the Permanent Mission of the Union of Soviet Socialist Republics to the United Nations. In his attempts to obtain the three year extension, he signed a three year secondment agreement with the Government. It was never clearly explained by the Applicant in his submissions how the support he received from his Government, in agreeing to the three year period, prejudiced his chances with the Administration. On the contrary, it appears that the Applicant, in seeking the approval of his Government, was attempting to use this support as a means of influencing the Administration to grant him a three year fixed-term contract. In any event, the Tribunal also finds that the Applicant's claim regarding his secondment status is time-barred since it was not the subject of a timely appeal.

V. When the Applicant was offered the one year extension, on 25 October 1991, he signed a Letter of Appointment. Again, on 13 November 1992 and on 5 January 1993, when his appointment was extended, he signed further Letters of Appointment. Since the Applicant failed to show any evidence of coercion or duress placed on him by the Administration, he is bound by the terms and conditions of these Letters of Appointment, including the duration of each appointment. It is clear to the Tribunal that the Applicant could have refused these appointments at the times they were offered. Having accepted their terms, he cannot now seek to rely on the original offer of a three year extension. (Cf. Judgements No. 336, Maqueda Sanchez (1984); No. 500, Pappas (1990); No. 506, Bhandari (1991); No. 559, Vitkovski and Rylkov (1992)).

VI. The Applicant submits that the decision of the Administration to reorganize the Department of Conference Services (DCS), and consequently to abolish his post, was in part motivated by a desire to remove him from office. He further argues that he was denied due process and that the Respondent's discretion in this case was exercised with caprice, prejudice and unfairness. Indeed, a staff member is entitled to challenge the Respondent's decision to reorganize if he can prove that it was vitiated by prejudice or some other improper motive. (Cf. Judgement No. 350, Raj (1985)). In the present case, however, the Tribunal accepts the JAB's conclusions that there was no basis for the Applicant's claim that he was denied due process and that the Applicant did not satisfy the burden of proving that the decision to reorganize the Department and abolish his post was improper or based on anything other than organizational considerations.

VII. The Administration has complete discretionary powers to determine whether a reorganization is needed. The Tribunal does not have the authority to examine how the reorganization was undertaken

or if better results would have been obtained if the reorganization did not take place. (Cf. Judgements No. 117, Van der Valk (1968); No. 350, Raj (1985); No. 412, Gross (1988)). According to the facts of this case, the reorganization of the Secretariat was a publicly announced policy goal of the Secretary-General. The reorganization of DCS was to be part of it. It has been held by the Tribunal that the mere fact that "a reorganization may hinder the prospects or in any way affect the career of a staff member does not necessarily point to the existence of discrimination or improper motives in the Administration and thus, does not in itself give grounds for any claim against the decision taken." (Cf. Judgement No. 350, Raj (1985)).

VIII. With respect to the Applicant's claim that he had a legal expectancy of continued employment based on his record, it too must fail. The Tribunal notes that in accordance with staff rule 104.12(b), each Letter of Appointment that the Applicant signed specifically stated the duration of the appointment and that the appointment carried no expectancy of renewal. It has been the Tribunal's consistent jurisprudence that, absent exceptional circumstances (not present here), employment with the Organization ceases on the expiration date of a fixed-term appointment and that moreover, even in the light of outstanding performance by the staff member, no legal expectancy of renewal would be created. (Cf. Judgements No. 173, Papaleontiou (1973); No. 205, El-Naggar (1975); No. 368, Roy (1986); No. 427, Raj (1988); No. 440, Shankar (1989); and No. 506, B. (1991)).

IX. In conclusion, the Tribunal finds that:

(1) The Applicant's claims regarding the initial offer of a three year extension of his appointment and his status concerning his secondment, are time-barred.

(ii) The Applicant had no legal right to the renewal of his appointment, and failed to prove the existence of extraneous considerations or improper motives regarding the Respondent's decision to reorganize DCS.

X. Based on the above, the Tribunal rejects the application in its entirety.

(Signatures)

Jerome ACKERMAN
President

Francis SPAIN
Member

Mayer GABAY
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/720
21 November 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 720

Case No. 800: KRASNOV

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, on 15 July 1994, Guennadi A. Krasnov, a former staff member of the United Nations Conference on Trade and Development, hereinafter referred to as UNCTAD, filed an application containing, inter alia, the following pleas, requesting the Tribunal:

"(a) To order the rescinding of the decision of the Secretary-General of 30th December 1992 to terminate the Applicant's services with effect from 31 March 1993;

(b) To order the Secretary-General to extend the Applicant's contract at the level of D-2 in the UNCTAD Secretariat at least until the age of his statutory retirement, i.e. March 1997, with compensation for the period between 31 March 1993 and the date of restoration of the appointment;

(c) Or, alternatively, to order that the Applicant be paid financial compensation equivalent to his D-2 salary and related allowances from 31 March 1993 until the age of his statutory retirement, that is March 1997, as well as the amount, equivalent to the loss of pension rights for the same period."

Whereas the Respondent filed his answer on 2 March 1995;

Whereas the Applicant filed written observations on 21 April 1995;

Whereas the facts in the case are as follows:

The Applicant, a national of the former Union of Soviet Socialist Republics (USSR), entered the service of UNCTAD on 19 November 1972, on a two-year fixed-term appointment, as an External Relations Officer, at the P-4, step III level. The Applicant's appointment was subject to the special condition that he was on secondment from the Government of the USSR. The Applicant's appointment was extended until 30 November 1978. On 1 April 1976, the Applicant was promoted to the P-5 level, as Chief, External Relations Section. The Applicant resigned with effect from 15 August 1978. On 4 September 1983, the Applicant re-entered the service of UNCTAD on a two-year fixed-term appointment, at the D-2 level, as Director, Division for Trade with Socialist Countries, again on secondment from the Government of the USSR. The Applicant's fixed-term appointment, on secondment, was subsequently extended six times, through 31 March 1993, when he separated from service.

In a memorandum to UNCTAD staff members, dated 20 May 1988, the Secretary-General of UNCTAD described the re-organization of the UNCTAD Secretariat. The Division the Applicant headed was abolished and he was temporarily re-assigned as Director/Associate Coordinator of the International Trade Programmes of UNCTAD. The twelve other staff members serving in his division were also temporarily re-assigned to other units of the UNCTAD Secretariat. At its 46th Session in 1991, the General Assembly, in its resolution 46/185 C, IX, section 15, decided that the thirteen redeployed posts should be temporarily retained for 1992.

In a facsimile dated 19 August 1992, the Secretary-General of UNCTAD recommended to the Assistant-Secretary-General for Human Resources Management that the Applicant's appointment, which was to

expire on 4 September 1992, should be extended through 31 December 1992, pending the General Assembly's consideration of the staffing and structure of UNCTAD. On 1 October 1992, the Assistant-Secretary-General for Human Resources Management approved the extension. In a memorandum dated 14 October 1992, the Secretary-General of UNCTAD informed UNCTAD staff of the decision to proceed with a reorganization of the UNCTAD Secretariat. The memorandum described the new arrangements and included a list of staff deployment, which contained the Applicant's name. Subsequently, the Applicant was granted a final extension of his appointment for three months, through 31 March 1993.

On 1 February 1993, the Applicant requested the Secretary-General of the United Nations to review this administrative decision. On 9 March 1993, the Director of Personnel informed the Applicant as follows:

> "As you are aware, reform of the economic and social sectors of the Secretariat is currently under way and in light of pertinent programmatic, financial and personnel considerations, as well as the decisions taken by the Fifth Committee, the Secretary-General has decided that you be granted a final three-month extension of your fixed-term appointment through 31 March 1993.
>
> This decision of the Secretary-General does not imply in any way dissatisfaction with your performance as your record of service with UNCTAD is noteworthy. As you are aware, the fixed-term appointment does not carry any expectancy of renewal in the Secretariat of the United Nations. I regret, therefore, to inform you that the decision of the Secretary-General is maintained."

On 26 March 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against this decision. He also requested a suspension of action on the contested decision pursuant to staff rule 111.2 (f).

The JAB, in a report dated 31 March 1993 on the request for suspension, recommended that the decision not to extend the

Applicant's contract beyond 31 March 1993 be suspended for a period of two months as of 1 April 1993. That recommendation was rejected by the Secretary-General.

On 27 April 1994, the JAB adopted its report on the merits of the case. Its conclusions and recommendation read as follows:

> "37. The Panel concludes that the surrounding circumstances and facts cannot be held as having created a legitimate expectancy of renewal of the Appellant's fixed-term appointment.
>
> 38. The Panel further concludes that there is no evidence to indicate that the decision of non-renewal of the Appellant's fixed-term appointment was motivated by prejudice, abuse of power or extraneous factors.
>
> 39. The Panel finally concludes that the consideration of the Appellant for a permanent appointment in 1988 is not relevant to the present appeal.
>
> 40. In view of the foregoing, the Panel makes no recommendation in support of this appeal."

On 12 May 1994, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and advised him as follows:

> "The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's conclusions that you did not have a legitimate expectancy of renewal of your appointment, that there was no evidence to indicate that the decision of non-renewal was motivated by prejudice, abuse of power or extraneous factors, and that the consideration of a permanent appointment for you in 1988 was not relevant to the present appeal. The Secretary-General has also taken note of the Board's determination to make no recommendation in support of your appeal, and, accordingly, has decided to maintain the decision and take no further action in respect of your case."

On 15 July 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision not to renew the Applicant's fixed-term appointment beyond 31 March 1993 was taken in a discriminatory manner and caused damage to his reputation and career prospects, inside and outside the United Nations.

2. The Applicant had a legitimate expectancy of renewal of his fixed-term appointment.

3. The Applicant is entitled to a permanent appointment.

4. The Respondent's decision dramatically affected the Applicant's pension benefits and his employment opportunities.

5. The Applicant cannot be held responsible for his "secondment status".

Whereas the Respondent's principal contentions are:

1. The Applicant was employed pursuant to a fixed-term appointment which carried no expectancy of renewal and which expired on its own terms.

2. The Applicant has adduced no evidence of discrimination or bad faith in the decision not to renew his appointment.

3. The Applicant has failed to establish any basis for his claim that he had a "legitimate expectancy" of the renewal of his fixed-term appointment.

4. The consideration of the Applicant for a permanent appointment in 1988 is not an issue in this case. In any event, it is time-barred.

The Tribunal, having deliberated from 2 to 21 November 1995, now pronounces the following judgement:

I. This is an appeal from a decision of the Respondent dated 12 May 1994, based on a unanimous Joint Appeals Board (JAB) recommendation dated 27 April 1994. The JAB concluded, contrary to

the Applicant's contention, that he did not have a legitimate expectancy of renewal of his fixed-term appointment. Furthermore, the JAB found no evidence that the decision not to renew the Applicant's fixed-term appointment was motivated by prejudice, abuse of power or extraneous factors. Finally, the JAB concluded that whether the Applicant should have been considered for a permanent appointment in 1988 was not relevant to the appeal.

II. The Applicant asks that the decision of the Secretary-General, extending his fixed-term appointment to 31 March 1993, be rescinded. He further requests that his appointment be extended at the D-2 level, at least until his retirement age in March 1997, with compensation for the period between 31 March 1993 and the date of his reinstatement. In the alternative, the Applicant asks that the Respondent be ordered to pay him an amount equivalent to his D-2 salary and related allowances from 31 March 1993 until he reaches retirement age in March 1997, as well as an amount equivalent to the loss of pension rights for the same period. The Tribunal declines to call the former Secretary-General of UNCTAD as a witness, as requested by the Applicant, or to hold an oral hearing, as the file is adequate for decision of the case.

III. In support of his pleas, the Applicant contends that he had a legal expectancy of the continuation of his appointment until retirement age. He argues that the Respondent's action in permitting his fixed-term appointment to expire was wrongful. He says that he should have been, but was not, considered for a career appointment long before his fixed-term appointment expired.

IV. Following a series of two or three-year fixed-term appointments beginning in 1972, with an interruption between 1978 and 1983, the Applicant was serving on a fixed-term appointment scheduled to expire on 3 September 1992. At that time, UNCTAD was

in a process of reorganization of its activities. On 1 October 1992, UNCTAD obtained approval of an extension of the Applicant's appointment through 31 December 1992, while awaiting action by the General Assembly on its proposals for reorganization in 1993. The General Assembly subsequently received a proposal from the Respondent to extend the temporary posts (including the one encumbered by the Applicant) through 1993, on a temporary basis. On 14 October 1992, the Secretary-General of UNCTAD notified the staff of his proposed organizational arrangements in the UNCTAD Secretariat, pointing out that they "must ... be regarded as subject to change." The memorandum listed all UNCTAD staff, including the Applicant.

V. On 30 December 1992, UN Headquarters informed the Secretary-General of UNCTAD that the Respondent had approved certain recommendations "in the light of pertinent programmatic, financial and personnel considerations." Included among the recommendations was one relating to the Applicant which stated: "In the absence of appropriations for the UNCTAD posts attached to the former UNCTAD subprogramme on trade among countries having different economic and social systems, and in view of the overall post situation at the D-2 level and developments concerning the restructuring of the economic and social sectors of the Organization, [the Applicant] is to be granted a final three-month extension through 31 March 1993." The subsequent implementation of this decision led to the Applicant's appeal.

VI. The Tribunal concurs in the views expressed by the JAB with regard to the non-existence of any legal expectancy by the Applicant concerning a further appointment. As the Tribunal held in Judgement No. 559, Vitkovski and Rylkov paragraphs XI and XII (1992), such an expectancy may be found only in exceptional circumstances giving rise to a legal entitlement to a further contract, and the failure

to offer one engages the responsibility of the Organization. The Tribunal, like the JAB, does not consider that the facts in this case warrant a determination that a legal expectancy existed. The Applicant's description of his record with UNCTAD and his reference to the memorandum of the Secretary-General of UNCTAD, dated 14 October 1992, fall far short of establishing a legal expectancy, particularly since the latter warned that the arrangements set forth in it were subject to change.

VII. The Applicant also contends that it was improper for his appointment not to be extended when the General Assembly approved, for 1993, continuation of certain temporary posts, including the one that he encumbered. However, the Tribunal notes that the reasons for non-extension given to the Applicant in a letter dated 9 March 1993, from the Director of Personnel, were broader in scope than the issue of whether the particular post he was encumbering was being continued for 1993. The reasons were plainly within the discretionary authority of the Respondent as to reform and reorganization of the economic and social sectors of the Secretariat. There is no evidence at all that the decision not to extend the Applicant's appointment was based on any unlawful hostility directed toward him or that it was improperly influenced in any way. Indeed, the Applicant appears to have been treated with consideration and respect in the last two extensions he received and in the tenor of communications to him. In the view of the Tribunal, the decision of which he complains was based entirely on lawful management considerations.

VIII. With respect to the Applicant's argument that he should have been considered for a permanent appointment in 1988, the Tribunal also concurs with the JAB's view that this is not germane to the present appeal. As the Tribunal noted in Judgement No. 559, supra, paragraph X, if the Applicant had wished to challenge the secondment

practices of his Government and the foreclosure by the Organization of his possibilities for a career appointment under General Assembly resolution 37/126, he should have done so in a timely fashion. He did not. That being the case, he was not free to raise the issue in 1992 or 1993 in connection with the decision against the extension of his fixed-term appointment. The Tribunal notes, parenthetically, that, in contrast to other applicants who have complained about secondment practices and their effect on career appointments or extensions of fixed-term appointments, in this case, the Applicant's efforts for a further extension of his appointment had the strong support of his Government, as shown by letters, dated 5 January 1993 and 12 March 1993, to the Secretary-General of UNCTAD from the Permanent Representative of the Russian Federation.

IX. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Francis SPAIN
Member

Mayer GABAY
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/721
21 November 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 721

Case No. 798: HEVI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas at the request of Vincent Hevi, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 May 1994;

Whereas, on 31 May 1994, the Applicant filed an application requesting the Tribunal, inter alia:

"8. ...

(a) To rescind the decision of the Secretary-General to summarily dismiss the Applicant;

(b) To order the Applicant's immediate reinstatement with payment of full salary and applicable allowances and benefits from the date of his separation from service to the date of reinstatement;

(c) To find and rule that the Joint Disciplinary Committee erred as a matter of law in failing to find that the Applicant's rights to due process and fundamental fairness were violated ...;

...

(f) To award the Applicant appropriate compensation ... for the actual, consequential and moral damages suffered by the Applicant to his career and reputation, as a result of the Respondent's actions or lack thereof;

(g) To fix, pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at two years' net base pay;

(h) To award the Applicant, as costs, the sum of $5,000."

Whereas the Respondent filed his answer on 12 September 1994;

Whereas the Applicant filed written observations on 16 November 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 28 May 1974, as a Field Service Officer at the FS-3 level, on a one year fixed-term appointment. His appointment was renewed on an annual fixed-term basis through 1 July 1979, when it was converted to a probationary appointment, which became permanent on 1 April 1980. The Applicant was promoted to the FS-4 level on 1 April 1982. From 15 December 1983, the Applicant was assigned to the United Nations Truce Supervision Organization (UNTSO), Jerusalem, as Finance Clerk. On 1 January 1986, his functional title was changed to Finance Assistant. From 26 June 1989, he was temporarily assigned to the United Nations Transition Assistance Group (UNTAG), Namibia, as a Field Service Assistant. He returned to UNTSO, Jerusalem, with effect from 20 June 1990. On 16 March 1991, his duty station was changed from Jerusalem to Gaza. On 1 April 1991, the Applicant was promoted to the FS-5 level, as Administrative

Assistant. On 20 April 1992, the Applicant was temporarily assigned to the United Nations Transitional Authority in Cambodia (UNTAC). On 24 December 1992, the Applicant was summarily dismissed for serious misconduct.

Upon his arrival in Gaza, on 20 March 1991, the Applicant was paid $6,358.04, representing an assignment grant payment, consisting of a daily subsistence allowance (DSA) portion and a lump sum portion. On 4 July 1991, he was credited with $8,404.03, representing a DSA from the date of his arrival in Gaza, less the amount of $6,358.04. This followed a determination that he was entitled to a DSA but not to an assignment grant. On 10 July 1991, the Applicant was paid $2,195.93, representing a "Gaza incentive" for the period from his arrival to 30 June 1991. The Applicant received payment of a DSA plus $642.19 per month "Gaza incentive" for July, August, and September 1991. On 15 October 1991, recovery of the "Gaza incentive" - a total of $3,870.89 - was ordered by the Administration. Payments of DSA for November and December 1991, and for January 1992 were withheld for that purpose.

While stationed in Gaza, the Applicant acted as Manager of the UN Reporting and Evacuation Centre in Gaza (the REC House), which included the Gaza Beach Club (the Club), a recreational facility, managed not by the Organization but the staff. On 29 February 1992, in the presence of the Applicant, a surprise cash count of the funds of the Club was conducted and a cash deficit was found.

On 16 March 1992, the Chief Administrative Officer (CAO), UNTSO, Jerusalem, transmitted to the Applicant a copy of a memorandum to him, dated 10 March 1992, from the Field Administration Officer, UNRWA, Gaza, reporting on the cash count that had been conducted and indicating that a discrepancy of $6,543.49 had been found. The CAO requested a "written explanation on this subject" from the Applicant and advised him "your immediate action is to return all the funds that were missing soonest."

In his reply dated 20 March 1992, the Applicant stated that he had "borrowed some money (recorded) from the profit" of the REC House, which he intended to repay upon receipt of a loan he had applied for. He explained that what compelled him to borrow this money was "unexpected drastic change in my entitlements of Gaza mission," which had created financial hardship. He further stated that, at the time of the surprise cash count, he had informed the officials present of the situation.

In a memorandum to the Applicant, dated 2 April 1992, the CAO noted that the missing sum of $8,800.00, had been repaid. He further stated:

> "Your explanation together with an apology provides me with the background to this matter. There remains, however, the fact that you provided yourself with an unauthorized loan in the form of a significant sum of money from funds you were holding in trust on behalf of the UN community in Gaza. The officers of the REC-House Management Committee have advised me that they are satisfied with the apology and the settlement now being made and they are not pressing any charges against you. But they, as well as I, are most disappointed over your act. Your performance in Gaza had been considered as very good - and without any blemish - until the audit visit on 29 February 1992, and you were even promoted to the FS-5 level during your tour of duty there.
>
> Had the REC-House funds been under the official administration and control of the UN, it would have been my duty to inform the UN Controller of what happened, with every possibility of serious consequences for yourself. I must advise you that I still consider your act as totally unacceptable. As your direct supervisor I reprimand you in the strongest possible terms. I trust that you will understand this and refrain from any similar act in the future, whatever may be the state of your personal finances.
>
> I am copying the present memorandum, as well as the preceding correspondence to the Chief of Staff, UNTSO, and to ..., Chief, Field Personnel Section, at FOD, Headquarters."

On 4 May 1992, the Director of Staff Administration and Training Division, Office of Human Resources Management (OHRM), advised the Director, Field Operations Division, Office of General Services, that the matter should be reported to the Controller and that OHRM was "considering the case to determine whether disciplinary proceedings should be initiated".

On 29 May 1992, the CAO advised the Applicant that OHRM had requested him to initiate disciplinary proceedings in accordance with ST/AI/371. After informing the Applicant that he was charged with misconduct, he asked him to provide a response in writing, or produce countervailing evidence. He also advised the Applicant of his right to seek the advice of another staff member or retired staff member to assist him.

On 7 August 1992, the Applicant provided a written response to the charge. He stated, inter alia, that he had borrowed the money because, as a result of a retroactive change in the nature of his reassignment from Jerusalem to Gaza, the Administration had determined that he was not entitled to the allowances and entitlement payable in case of a within-mission transfer, and that he was required to repay certain amounts which had been paid to him. He claimed that the "painful execution [of the decision] with retroactivity put [him] in financial straits." He also stated that he began borrowing from the REC House/Beach Club funds in November 1991, and attached copies of IOU receipts, kept in his personal file, which recorded the transactions, from 5 November 1991 to 30 January 1992, for a total amount of $8,800.00. He stated that he had informed the UNRWA Field Finance Officer who audited the REC House/Beach Club of his borrowing before the audit was conducted. He claimed that his motive was not to embezzle funds but "to borrow a quick short-term loan which [he] intended to repay as soon as [he] got [his] pending UN Credit Union loan approved." He noted that the full amount had been repaid on 1 April 1992.

On 23 October 1992, the Assistant Secretary-General for Human Resources Management recommended to the Secretary-General that the Applicant be summarily dismissed. This recommendation was endorsed by the Legal Counsel, and approved on behalf of the Secretary-General by the Under-Secretary-General for Administration and Management. In a letter dated 25 November 1992, the Director of Personnel informed the Applicant of the Secretary-General's decision to summarily dismiss him for "serious misconduct", effective "at the close of business on the day on which you receive this notification." The Applicant, who was then serving in Cambodia with UNTAC, received the letter on 24 December 1992.

On 3 February 1993, the Applicant requested a review by the Joint Disciplinary Committee (JDC) of the decision to summarily dismiss him. The JDC adopted its report on 18 October 1993. It recommended that "the Secretary-General maintain the decision already made." On 10 November 1993, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JDC report and advised him that the Secretary-General had decided to maintain his decision.

On 31 May 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's only discernible fault is not dishonesty, but rather naïveté in failing to comprehend the implications of his actions despite a scrupulous effort to record, report and rectify them, rather than concealing or denying them.

2. No United Nations funds were involved, nor was the Applicant's error committed while exercising a United Nations function.

3. Summary dismissal was a disproportionate penalty for the harm, if any, caused to the United Nations.

4. Although the Secretary-General has broad discretion with regard to disciplinary matters, that discretion must not be exercised with the degree of arbitrariness exhibited in this case.

Whereas the Respondent's principal contentions are:

1. The decision to dismiss the Applicant was a proper exercise of the Secretary-General's discretionary authority in disciplinary matters.

2. The Applicant's due process and procedural rights were fully respected.

The Tribunal, having deliberated from 30 October to 21 November 1995, now pronounces the following judgement:

I. The Applicant's case consists of two main claims; first, that proper procedures were not observed and secondly, that mitigating factors were not taken into account, i.e. that the penalty was too severe.

When the financial discrepancy was first discovered, the Applicant readily admitted his guilt and repaid the money, albeit after the discovery of the discrepancy. Subsequently, the Chief Administrative Officer (CAO), UNTSO, Jerusalem, requested an explanation from the Applicant. The Applicant now complains that, at that stage, he was not informed of his right to seek assistance from another staff member or a retired staff member. The Applicant responded to the CAO's request and he now says that his response was used subsequently as the basis of disciplinary action.

The Applicant also complains that he was not informed of an UNRWA audit conducted on 24-28 March 1992 and so did not have the opportunity to respond to it.

II. The first part of this episode ended with the CAO's reprimand of the Applicant. The Beach Club expressed the view that the Applicant's failure to obtain prior approval was a mistake to which a stern admonition was a sufficient response.

The matter did not end there. The CAO was requested by the Office of Human Resources Management to initiate disciplinary proceedings against the Applicant. He was asked to give an account in writing or to produce countervailing evidence. He was advised that he could seek the assistance of a current or retired staff member to represent him. He was told that he could contact the staff representative for this purpose. The initial disciplinary proceedings ended with a recommendation that the Applicant be summarily dismissed for serious misconduct.

III. The Applicant sought a review by the Joint Disciplinary Committee (JDC). He now contends that the JDC did not conduct an independent review of the issues, and that it did not carry out its own review of the facts.

Even if the JDC made use of information obtained in an earlier investigation and even if that investigation could be said to have been carried out in a manner which did not fully recognize the Applicant's rights, it is difficult to see how this was prejudicial to the Applicant. In the CAO's investigation, the Applicant admitted his guilt.

The JDC, as well as being in possession of the results of the preliminary investigation, did carry out its own investigation. It

met twice and only then did it reach its conclusion. The Tribunal is satisfied that the JDC conducted its review properly.

IV. But what of the Secretary-General's decision to dismiss the Applicant?

The Applicant had served the Organization for many years with an unblemished record. Indeed, he was highly thought of and his ability and hard work were never in doubt.

He engaged in voluntary work at the Beach Club for the benefit of UN personnel.

The records which he kept when taking the money would appear to indicate an intention to repay it, which he subsequently did, by means of a loan which he obtained.

As a result of an unexpected reduction in his income, resulting from a mis-classification of his assignment by the Administration, the Applicant says he found himself in financial difficulties. While under pressure, he sought to solve the problem in an unacceptable manner, but he promptly admitted his guilt on enquiry and made restitution.

V. The Tribunal recognizes the Secretary-General's wide discretion in disciplinary matters and in determining what is serious misconduct. The Tribunal notes that there were mitigating facts, i.e. the fact that the Beach Club was prepared to close the matter and is connected only in a peripheral manner with the Organization, the circumstances in which the offence was committed, and the manner in which the Applicant made amends. However, despite such factors, because of the seriousness of the offence, the Tribunal must conclude that the Respondent was justified in summarily dismissing the Applicant.

VI. The Tribunal, therefore, rejects the application.

(Signatures)

Samar SEN
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/722
21 November 1995

ORIGINAL: ENGLISH

Judgement No. 722

Case No. 814: KNIGHT ET AL

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Hubert Thierry; Mr. Mayer Gabay;

Whereas at the request of Fabiola Knight, Lucia Carrasco-Battin, Margaret Cullimore, Wilga Evans, Cynthia Irish, Bepty Laurencon, Beverley Mallinson, Anna McAlpine-Nunez, Friedda M. Radovic, Emma Rana, Grace Ann Simonetti, Lena Yacoumopoulou, and Pamela Zapata, staff members of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 July 1994;

Whereas, on 28 July 1994, the Applicants filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 19 October 1994, the Applicants, after making the necessary corrections, again filed an application requesting the Tribunal:

> "7. [To recognize] their right to be considered for promotion to the Professional category on the basis of equity and merit. ... in accordance with the 'Charter of the United

Nations, the Staff Regulations and Rules and the relevant records.' [And] to rescind the Respondent's decision ... not to consider the Applicants for promotion to the Professional category.

8. [To recognize]:

(a) That the denial by the Respondent to consider the candidature of the Applicants on the assertion that 'there is still only one system in place for moving from the General Service to the Professional category, namely: the G to P examination ... was illegal ...

(b) That ... it also resulted in de facto discrimination on the basis of sex. ...

(c) That the preclusion of some of the Applicants who are citizens of countries where National Competitive Exams have been held from participating in those exams constitutes illegal discrimination.

(d) That accordingly, the Applicants are entitled to compete and be considered by the relevant promotion bodies for professional posts from the P-1 to the P-3 levels on an equal footing and on the basis of merit with other candidates, external or internal.

9. ... to decide on payment to the Applicants for salaries lost due to the non-progression of their careers owing to the illegal decision of the Respondent."

Whereas the Respondent filed his answer on 17 March 1995;

Whereas the Applicants filed written observations on 30 September 1995;

Whereas, on 16 October 1995, the Respondent submitted comments on the Applicants' written observations;

Whereas, on 17 October 1995, the Applicant Radovic submitted observations on her files;

Whereas, on 23 October and 2 November 1995, the Respondent submitted further comments on the Applicants' written observations;

Whereas, on 2 November 1995, the Tribunal put a question to the Respondent, to which he provided an answer on 3 November 1995;

Whereas, on 16 November 1995, the Applicants submitted an additional statement;

Whereas the facts in the case are as follows:

The Applicants are staff members of the United Nations in the General Service category who sought entry into the Professional category. The Applicants' length of service with the United Nations varies from 15 to 35 years. Their performance evaluation reports range from "very good" to "excellent".

Eleven of the Applicants, in 1990, wrote to the Assistant Secretary-General for Human Resources Management, expressing concern regarding their prospects for promotion. In response, the Assistant Secretary-General for Human Resources Management advised them that while many staff members in the General Service category merit consideration for promotion to the Professional category, there was only one system for moving from one category to the other.

On 30 December 1991, the Applicant Yacoumopoulou applied for a P-3 post. In a memorandum dated 26 February 1992, the Assistant Secretary-General for Human Resources Management advised her that General Assembly resolution 33/143 required all movement from the General Service to the Professional category to be by competitive examination and that "there is to be no exception to this procedure". On 10 April 1992, she requested the Secretary-General to review this decision.

On 9 March 1992, the Applicant Zapata applied for two Public Information posts. In a memorandum dated 20 March 1992, the Director, Recruitment and Placement Division, advised her that General Assembly resolution 33/143 required all movement from the General Service to the Professional category to be by competitive

examination. On 9 April 1992, she requested review of this decision and asked for direct submission of her appeal to the Administrative Tribunal. In a letter dated 23 July 1992, the Director, Staff Administration and Training Division, Office of Human Resources Management, advised her that the decision would be maintained.

On 24 July 1992, the Applicants lodged an appeal with the JAB, seeking "recognition of their rights to be considered for promotion to the Professional category on the basis of equity, irrespective of the type of promotion system applicable". At the time of their appeal to the Joint Appeals Board (JAB), the Applicants Yacoumopoulou and Zapata were at the G-6 level, and the other Applicants were at the G-7 level. Since then, the Applicant Yacoumopoulou has been promoted to the P-2 level. The Applicants Irish, Rana and Evans have retired. The Applicant Cullimore has separated from service pursuant to an agreed termination.

On 20 January 1994, the JAB adopted its report. Its considerations and recommendations read as follows:

> "11. Dealing first with the procedural issues raised by the Respondent, the Panel considered the contention that the appeal was not challenging an administrative decision by the Secretary-General but was requesting that the Secretary-General should take certain steps in connection with the G-to-P examination system. The Panel held that the rejections by the Secretary-General of Appellants' submissions in connection with the refusal to promote them without their passing the examination were administrative decisions, subject to appeal to the JAB.
>
> 12. The Panel also rejected the contention that one of the claimants, Ms. Yacoumopoulou, no longer had standing to pursue the appeal because, since filing it, she had passed the G-to-P examination and had been promoted to the P-2 level. Yielding to the necessity of accepting what she could not change does not deprive her of the right to challenge the legality of that necessity. Moreover, as part of the appeal consists of challenging the bar to an application from a

General Service staff member for a P-3 post, for which she submits she is qualified, her present status does not affect her standing as a party to this appeal.

13. The Respondent had asked that the case of every Appellant in the group be dealt with on its own merits. The Panel, after examining the cases, came to the conclusion that the particular circumstances of any individual Appellant did not affect its recommendations, which related to all members of the group.

14. Turning next to what it considered the central issue of the case, the Panel expressed understanding for the view that the system of G-to-P examination was discriminatory in respect of a whole category of staff, namely, the General Service category, which, unlike others, was singled out by having to pass an examination in order to be promoted to a higher category. It was also discriminatory against women, who make up the majority of this category. However, the Panel found it difficult to brand the examination as illegal in view of the fact that it was the General Assembly which had introduced it and that its legality had been upheld by the UNAT (e.g., in Judgement No. 266, Capio). For that reason it was unable also to grant Appellants' request for monetary compensation. In light of objections to it by the staff, the Secretary-General had promised many times in the past to review the system. The Panel recommends that the Secretary-General carry out the undertaking given in these promises as soon as possible.

15. The Panel requested and received from the Respondent information on exceptions to the G-to-P examination and to the National Competitive Examination, on the number of posts available for promotion through the G-to-P examination and on the occupational groups covered by that examination. The Panel did not consider, however, that the information sought by the Appellants on the costs of the examination was relevant to the issues in the case and therefore did not request it.

16. From the answers by the Respondent to its questions, the Panel noted that there was no systematic approach to the G-to-P examination either in determining the area of occupation groups covered by the G-to-P examination in any given year or in determining the number of posts to be filled by successful candidates in the examination. The Panel further noted that often the job descriptions of G and P

posts differ very little and that the G-to-P examination does not allow evaluation of staff performance on the job or of performance at a higher level during mission assignments. The Panel recognized the need for the purpose and the procedure of the G-to-P examination to be made more transparent and therefore recommends that all available posts, including those at the P-2 level, should be advertised.

17. The Panel agrees with Appellants' contention, summarized above in paragraph 5(d), that any bar to taking the National Competitive Examination for posts in the P category based on age is discriminatory. In this context, the Panel referred to the National Competitive Examination held by the US government in 1992 where the age-limit was 35 for the P-2 examination and 39 for the P-3 examination. The Panel unanimously recommends that the Secretary-General should remove all age-limits in National Competitive Examinations for UN employment.

18. Regarding the argument by the Respondent that the Secretary-General was explicitly restrained by the General Assembly from making exceptions to the G-to-P examination as the only means of promotion to the P category, the Panel found that the restraint imposed did not prevent him from asking the General Assembly to approve exceptions, especially if they were presented as part of a comprehensive scheme. The Panel therefore recommends that the Secretary-General should submit such a scheme, detailing the exceptions he proposes as well as proposals for reform of the system".

On 18 February 1994, the Under-Secretary-General for Administration and Management informed the Applicants as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has noted the Board's conclusion that the G-to-P examination is not illegal in view of the fact that it was the General Assembly which introduced it and that its legality has been upheld by the U.N. Administrative Tribunal. He has also noted the Board's negative finding regarding your request for monetary compensation. The Secretary-General has therefore decided not to grant you the monetary compensation requested in your appeal and to take no further action in regard to your specific case.

The Secretary-General, however, has also noted the concerns expressed by the Board in regard to the G-to-P examination and the National Competitive Examination. Although the Board's recommendations on these subjects are of a policy nature, the Secretary-General has given them serious consideration and is requesting the appropriate offices to undertake a careful examination of the issues raised".

On 19 October 1994, the Applicants filed with the Tribunal the application referred to earlier.

On 1 May 1995, the Assistant Secretary-General for Human Resources Management announced a number of measures relating to the recruitment for posts at the P-2 and P-3 level and the P-2 and P-3 examinations, which would be open by invitation to qualified staff members in the General Service category meeting the entrance criteria applicable to external candidates, including age, education, experience and nationality requirements. With regard to short-term appointments at the P-2 and P-3 levels, extensions of the initial contract would be dependent on the incumbent passing this examination for the appropriate occupational group.

Whereas the Applicants' principal contentions are:

1. The Applicants should be considered for promotion to the Professional category on the basis of merit.

2. The system regulating promotions from the General Service to the Professional category, by competitive examination, is discriminatory in respect of the General Service category.

3. The competitive examination has been implemented in an unfair manner.

4. The Respondent has not proved to the Applicants' satisfaction that no persons have been exempted from the exam.

Whereas the Respondent's principal contentions are:

1. The G-to-P competitive examination was established on the basis of and in conformity with the applicable resolutions of the

General Assembly. The system forms part of the terms of employment of staff.

2. The G-to-P competitive examination is in accord with the Charter of the United Nations and its legality has been upheld by the Tribunal.

The Tribunal, having deliberated from 1 to 21 November 1995, now pronounces the following judgement:

I. This is an appeal filed jointly by thirteen staff members from a decision of the Secretary-General dated 18 February 1994, rejecting the claims by the Applicants that they were unlawfully required to adhere to the competitive examination procedure in order to be eligible for promotion to the Professional category. The decision took into account the recommendations of the Joint Appeals Board (JAB) which, though adverse to the Applicants with respect to the principal objective of their appeals, had urged further consideration regarding certain matters raised by the appeals. The Secretary-General, noting that the JAB recommendations were of a policy nature, stated that he had given them serious consideration and was requesting the appropriate offices to undertake a careful examination of the issues raised.

II. Since the JAB dealt with the cases in a single report because the basic issues raised were common, the Tribunal also will join the cases and dispose of them in a single judgement. All of the Applicants were staff members in the General Service category at the time they initiated their appeals. One was subsequently promoted to the P-2 level, after having passed a G-to-P examination, but for the purposes of this judgement will be considered on the same basis as the other Applicants.

III. The principal objective of the Applicants is, as they put it, to seek recognition of "their right to be considered for promotion to the Professional category on the basis of equity and merit." In essence, the contention advanced by the Applicants is that their rights as staff members have been infringed by their promotion to the Professional category being made dependent on passing the competitive examination established by the Respondent pursuant to General Assembly Resolutions.

IV. Although the Applicants disclaim any "intention at this point to assert that a specific General Assembly Resolution contravenes the Charter," in the view of the Tribunal, this disclaimer is, as a practical matter, contradicted by the substance of the appeals. For the Tribunal to hold that the Applicants can be promoted without passing the competitive examination would deny the General Assembly's power to mandate a competitive procedure, such as the examination, which the General Assembly itself has recognized as the response to its resolution. It would have to hold further that the Respondent acted unlawfully in implementing the General Assembly resolutions by establishing the competitive examination. As the JAB recognized, since the General Assembly introduced the system regulating promotion from the General Service category to the Professional category through the competitive examination and since the Tribunal had upheld the legality of the system in Judgement No. 266, Capio (1980), there is no valid basis for challenging its legality. It is thus untenable for the Applicants to maintain that they do not seek to overturn the action of the General Assembly on which the competitive examination is based.

V. The Tribunal has had a number of occasions to consider the competitive examination system, most recently in Judgement No. 694, Chen (1995), but has had no reason to question its legality or to

reconsider the Capio decision. The Applicants in this case briefly refer to Capio; they do not ask that it be reconsidered, and the Tribunal will not do so.

VI. Insofar as they deal with the circumstances of individual Applicants, these appeals focus on each of the Applicant's qualifications, experience and performance, arguing that they are of a high caliber and warrant consideration on merit among both internal and external candidates for vacancies in the Professional category. It appears that five of them took competitive examinations, and, in the one case noted above, a promotion to the Professional category resulted. The other four and those who did not take the exam do not raise any specific claim of non-observance of the requirements of the competitive examination. Rather, as they say in their application, the

> "... thrust of the present appeal is that the system regulating the movement from the General Service category to the Professional category is discriminatory vis-à-vis the General Service category as a whole. This category of staff, instead of being judged on merit for career opportunities, has been treated unequally by comparison to other categories of staff and external candidates. After the original General Assembly resolutions which first introduced the new way of movement from G to P through an exam, the administrative practice on this issue through the years has contravened the principle of equality."

The Applicants go on to say that their appeal

> "... points out faults of that system not only as described in ... ST/AI/268 ... but also as the system has been implemented, i.e. faults of the administrative practice in that regard. In this appeal the legality of ST/AI/268 and of the practice based on it is at stake."

VII. In furtherance of their general objective, the Applicants advance arguments of a policy nature. These aim at showing that the

competitive examination is unfair or discriminatory in certain respects and that it is not in the best interests of the Organization. Such arguments are addressed to the wrong forum. The specific requirements of the examination, such as the choice of occupational groups, or age requirements in national competitive examinations, are policy decisions by the Secretary-General made in the reasonable exercise of his discretion, based on his assessment of the staffing needs and objectives of the Organization. The Tribunal's function, as defined by its Statute, is to determine whether there has been non-observance of the terms of the employment contracts, which include the competitive examination. In these cases, the Tribunal can find no such non-observance since the competitive examination, as a whole, which is being challenged by the Applicants, is based on General Assembly resolutions and implementing administrative instructions. The goal of the Applicants is not to redress alleged violations of the system affecting them individually. They seek a fundamental change in the system as a whole, i.e. in the terms of their employment. But it is not the function of the Tribunal to substitute its views for those of the General Assembly or the Respondent on how best to manage the Organization.

VIII. Quite clearly, the General Assembly had a rational basis for requiring a competitive examination procedure for promotion from the General Service to the Professional category. Equally, the differentiation between various categories of staff, such as Professional, Field Service categories and General Service, has a rational basis. Moreover, the General Assembly could also reasonably take into account concerns regarding geographical distribution, which are inevitably involved in the filling of vacancies in the Professional category. The General Assembly, over

the years, has apparently not shared the policy objections now being asserted by the Applicants with respect to the Respondent's implementation of the system.

IX. The Respondent has stated, in the decision dated 18 February 1994, that he is undertaking an examination of the issues raised by the JAB recommendations. The Tribunal notes, in this regard, the introduction of measures outlined in a memorandum dated 1 May 1995, from the Assistant Secretary-General for Human Resources Management, which address some of the concerns raised by the Applicants. If the Applicants are dissatisfied either with the pace, the scope, or the outcome of the Respondent's examination, they are at liberty to submit their views to the Secretary-General as to the need for and nature of any legislative change in the system that they advocate. It is not for the Tribunal to legislate changes in a lawful system established by the General Assembly.

X. The General Assembly has the power to promulgate conditions of service for the staff. The International Court of Justice has so held in its advisory opinion of 20 July 1982, Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982, p. 325, paragraph 68. The view of the ICJ is entirely consistent with that previously indicated by the Tribunal in Capio. The Tribunal has also held that General Assembly Resolutions are part of the conditions of service that bind the staff. The Tribunal considers that, since the competitive examination places no improper restriction on the eligibility of any staff member for the competitive examination, it raises no questions under Article 8 of the Charter. The Tribunal likewise sees no conflict between the competitive examination system and Article 101 of the Charter since the obvious purpose of a competitive examination is to seek the best qualified of the candidates being examined.

XI. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Hubert THIERRY
Member

Mayer GABAY
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/723
21 November 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 723

Case No. 743: BENTALEB

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Mikuin Leliel Balanda;

Whereas, on 15 July 1993, Mokhtar Bentaleb, a staff member of the United Nations, filed an application requesting the Tribunal:

"[To order the production of certain documents, and]

(a) To find that Respondent has failed to implement Judgement No. 539 of the Administrative Tribunal;

(b) To order that Applicant's name be added to the 1992 P-5 Promotion Register and that he be promoted, as of 1 April 1992, to a P-5 post either in his present department or in another department;

(c) To award Applicant compensation, in the amount of two years' net base salary, for the continued violation of his rights by Respondent in disregard of Judgement No. 539 of the Administrative Tribunal;

(d) To award Applicant counsel's fees in the amount of $3,000."

Whereas the Respondent filed his answer on 5 August 1994;

Whereas the Applicant filed written observations on 31 May 1995;

Whereas, on 30 June 1995, the Tribunal put questions to the Respondent, to which he provided answers on 5 and 12 July 1995;

Whereas, on 19 July 1995, the Applicant commented thereon;

Whereas, on 21 July 1995, the Respondent submitted a further statement and the Applicant commented thereon on 25 July 1995;

Whereas, on 27 July 1995, the Respondent submitted a further statement;

Whereas, on 2 August 1995, the Tribunal informed the parties that it had adjourned its consideration of the case until its next session and put a further question to the Respondent;

Whereas, on 15 September 1995, the Respondent submitted his answer to the question put by the Tribunal and requested the Tribunal to defer consideration of the case, and on 10 October 1995, the Applicant provided comments thereon;

Whereas, on 30 October 1995, the Tribunal put a question to the Respondent to which he provided an answer on 2 November 1995;

Whereas, on 5 November 1995, the Applicant commented thereon;

Whereas, on 6 November 1995, the Tribunal informed the parties that it has decided to consider the case at its current session;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 1 November 1971, as an Associate Administrative Officer at the P-2 level, in the Training Service of the Office of Personnel Services. He served under a succession of fixed-term appointments until 1 July 1973, when he received a probationary appointment. On 1 April 1974, he was granted a permanent appointment and promoted to the P-3 level, as Administrative Officer. On 1 February 1977, the Applicant was reassigned as Recruitment Officer to the Technical Assistance Recruitment Service, Division of Recruitment. On 1 July 1977, he was promoted to the P-4 level. On 1 July 1978, he was transferred

to the Technical Assistance Recruitment and Administration Service, Department of Technical Co-operation for Development (TARAS/DTCD).

On 29 June 1990, the Applicant filed an application with the Tribunal challenging his non-inclusion in the 1986 P-5 Promotion Register. On 4 November 1991, the Tribunal issued Judgement No. 539. It found that in the departmental review, the Applicant "did not receive the full, fair and objective consideration to which he was entitled". The Tribunal held as follows:

> "XXIX. Since the Tribunal has concluded that the Secretary-General's exercise of discretion in disapproving the recommendation of the Appointment and Promotion Board for the Applicant's promotion was flawed for the reasons stated above, the Tribunal trusts that the Applicant will now receive from the Respondent the full and fair consideration to which he is entitled for promotion, at the earliest possible date, to a vacant P-5 post for which he is qualified, particularly in view of the unfair treatment to which he was subjected."

On 28 May 1992, a "Special Report" concerning the Applicant was sent from the Chief, TARAS/PSD[Programme Support Division]/DESD [Department of Economic and Social Development] to the Assistant Secretary-General, Office of Human Resources Management[1] (OHRM). In this report, the Chief, TARAS, stated: "I have found myself unable, in good conscience, to recommend a Within Grade Salary Increment ..." He noted that the Applicant's performance "has been causing serious problems in TARAS for a long time," and that in the past year "the decline in his performance" had been such as to force the Department to relieve him of certain functions.

On 31 July 1992, the Applicant submitted a rebuttal to the Special Report. He stated, inter alia, that the Special Report "must be viewed against the background of Judgement No. 539". He noted that the staff member who originated the Special Report was

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[1] Successor of the Office of Personnel Services.

the staff member whose lateral transfer had been criticized by the Administrative Tribunal in its judgement. He also stated that his most recent performance evaluation report (PER), covering the period from 1 February 1987 to 31 December 1990, had been withheld from him.

In the meantime, in a letter dated 16 June 1992, the Applicant requested the Secretary-General to "review the continuing disregard by the Department of Economic and Social Development (DESD) of Judgement No. 539 ..." He specified three administrative decisions as a manifestation of this disregard: (1) the transfer of a vacant P-5 post out of TARAS; (2) that his PER from the period 1987-1990 continued to be withheld from him; and (3) that a vacant P-5 post in TARAS had been filled through the transfer of a P-4 staff member from Geneva. The Applicant requested that these decisions be rescinded. On 1 September 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 29 October 1992, the Applicant signed his PER covering the period through 1990. On 27 November 1992, he instituted a rebuttal to his PER.

The JAB adopted its report on 3 May 1993. Its considerations and recommendations read, in part, as follows:

> "Considerations
>
> ...
>
> 21. The Panel had to consider whether Appellant had received full and fair consideration. Germane to this case, however, is the fact that the appellant is entitled to an evaluation of his performance in a timely manner as provided in ST/AI/240/Rev.2. The Panel considered that the failure of the Respondent to do so constitutes non-observance of the Appellant's terms of employment and, in this case, one which seriously jeopardizes his chances for promotion - thereby rendering the 'trust' which the UNAT reposed in the Respondent, misplaced.
>
> ...

24. The Panel first examined the Special Report which was prepared and signed by [...], Chief, TARAS, Programme Support Division (PSD), DESD [Department of Economic and Social Development]. The Panel found that, contrary to para. 16 of ST/AI/240/Rev.2, which stated that Special Report 'shall be made by the head of the department or office ...', the report was signed by [the Chief, TARAS/PSD/DESD] who is at the level of Chief of Service. The Panel felt, therefore, that the validity of the Special Report was questionable.

25. The Respondent had made the Special Report available to the JAB and the APB in order to indicate that the Appellant was fairly considered for promotion; however, his Department was dissatisfied with his performance. The Panel questioned the good faith of the Respondent by placing the above material before it. The Panel noted that since ST/AI/240/Rev.2 provides for a rebuttal procedure for special reports, even when the validity in preparing such reports is questionable and the process is not complete, it is not appropriate for the JAB to consider the substance of such an evaluation.

26. The Panel considers fair treatment to be part of Appellant's conditions of employment. It felt that these had been violated when the Respondent acted unfairly by submitting the Special Report to the JAB and the appointment and promotion bodies. The Panel noted that UNAT had held that staff members are entitled to fair treatment by the Organization (see Judgements No. 427, Raj and No. 442, Motamedi).

Recommendations

27. The Panel noted that Appellant's rebuttal on the Special Report was submitted on 31 July 1992 and that, so far, the Appellant has not yet received the list of proposed members of the rebuttal panel. The Panel considers this situation unacceptable and recommends that the Respondent take measures to allow the rebuttal investigation process to start immediately.

28. The Panel noted that the Special Report is not a substitute for the regular PER. Therefore, the Panel considered that the Appellant's latest PER, together with the results of the rebuttal, and the appraisal by the Head of the Department, were vital to the Appellant's receiving full and fair consideration by the appointment and promotion bodies. It, therefore, recommends that the complete documents of the Appellant['s] evaluation be placed before the appointment and

promotions body before it completes its consideration of the 1992 P-4 to P-5 promotion exercise in the Department of Economic and Social Development.

29. The Panel further recommends that, pending completion of the report of the rebuttal panel and its appraisal, the Special Report and the late PERs, be expunged from the Appellant's file.

30. The Panel makes no other recommendation in support of this appeal."

On 26 May 1993, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General had decided to accept the following recommendations:

"(i) The rebuttal investigation process start immediately;

(ii) The complete documents of your evaluation be placed before the appointment and promotion body before it completes its consideration of the 1992 P-4 to P-5 promotion exercise;

(iii) Pending completion of the regular report by the rebuttal panel and its appraisal by the Head of the department, the Special Report and the late PERs be expunged from your file."

On 15 July 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent failed to implement Judgement No. 539 by holding up his PER and then failing to investigate his rebuttal of the report, and by issuing a Special Report and failing to investigate his rebuttal to that report.

2. At no time in the past did the Respondent question the quality of the Applicant's performance. The real motive for a

sudden change in attitude by the Respondent towards the performance of the Applicant was a desire to avoid implementation of Judgement No. 539.

Whereas the Respondent's principal contentions are:

1. The Respondent has implemented Judgement No. 539 by giving the Applicant full and fair consideration for promotion.

2. The Applicant has failed to establish his allegations of bad faith and/or prejudice in the Respondent's implementation of Judgement No. 539.

3. The Applicant is not entitled to promotion.

The Tribunal, having deliberated from 29 June to 25 July 1995 in Geneva and from 10 October to 21 November 1995 in New York, now pronounces the following judgement:

I. The Applicant claims that UNAT's Judgement No. 539 has not been duly implemented by the Respondent. In Judgement No. 539, the Tribunal expressed its trust that the Applicant would receive "the full and fair consideration to which he is entitled for promotion, at the earliest possible date, to a vacant P-5 post for which he is qualified". The Applicant claims that he was not considered for the two posts which he alleges became vacant in his Department after Judgement No. 539 was rendered. He also claims that he was not duly considered by the Appointment and Promotion Board (APB) during the 1992 promotion review exercise. His main argument, in this respect, is that his latest performance evaluation report (PER) was withheld by the Administration in order to avoid placing it before the APB during the promotion review exercise.

II. The Tribunal wishes to recall at the outset that the recommendation included in its Judgement No. 539 in no way indicates that the Applicant should be considered for any given P-5 post on a priority basis or in a preferential way. The Tribunal's request was aimed exclusively at ensuring that the staff member would receive the same full and fair consideration for promotion to which all staff members are entitled.

The Tribunal also wishes to recall that staff members are not entitled to promotion. Their merits are appreciated freely by the relevant bodies of the Administration, albeit with due respect to the existing rules and regulations.

III. Having examined the evidence submitted to it, the Tribunal notes irregularities in the 1992 promotion review exercise that amount to a denial of the Applicant's right to be fully and fairly considered.

IV. The Tribunal notes that the Applicant's PER, covering the 1987-1990 period of service, was only completed in July 1992. Parts I through III of the PER are dated December 1990, but parts IV and V bear the date of October 1992. The Applicant instituted rebuttal proceedings in November 1992 but the process only commenced in May 1993, at the earliest.

As a consequence of these delays, when the 1992 Promotion review exercise began in January 1993, the Applicant's PER could not be placed before the APB because the rebuttal procedure was still under way. The rebuttal procedure was concluded in November 1994, many months after the promotion review exercise was over. The outcome was favourable to the Applicant, whose performance was upgraded to a "very good performance". Had the PER been prepared on time and had the rebuttal process been completed on time, the APB would have had a current satisfactory PER before it when reviewing

the Applicant. But this, of course, does not mean that the Applicant would have been deemed one of the best qualified candidates for the limited number of vacancies.

V. The Tribunal is not persuaded by the Applicant's allegations that the delays were due to a wilful design aimed at harming his career. There is, however, the possibility that the Applicant's career prospects suffered from these delays.

The Respondent claims that the delay in completing the Applicant's PER was partly his own fault, as he, for some time, refused to sign it. This could account for the period from July 1992, when the PER was completed, to October 1992, when it was finally signed by the Applicant. Nevertheless, the delay of 18 months from December 1990 to July 1992, does not appear to have been caused by any negligence on the part of the Applicant. The Administration should therefore be held responsible for it.

The Tribunal concludes that due to the Administration's delays, the Applicant could not have been fully and fairly considered by the APB.

VI. According to the record, among the reasons that led to the Applicant's non-inclusion in the 1992 Promotion Register were problems with his performance. The Tribunal notes that there was no valid documentary evidence indicating the existence of such problems. The only documents before the APB that alluded to the Applicant's unsatisfactory performance were the rebutted PER and the Special Report submitted in connection with the withholding of the Applicant's within grade salary increment. As both documents were being rebutted, they could not be relied on in the promotion review exercise, until the rebuttal process was concluded.

According to the letter dated 26 May 1993, from the Under-Secretary-General for Administration and Management to the Applicant, the Secretary-General decided that the complete documents

concerning the Applicant's "evaluation be placed before the APB before it completes its consideration of the 1992 P-4 to P-5 promotion exercise". In this way, the Secretary-General sought to ensure that the review of the Applicant by the APB would take place only when the rebuttal procedure had finished and all relevant documents in their final form had been made available to it. Nevertheless, the Applicant was reviewed by the APB in the absence of the "complete documents" required by the Secretary-General.

VII. For the foregoing reasons, the Tribunal finds that the Applicant was not fully and fairly considered during the 1992 Promotion Review Exercise and that, therefore, Judgement No. 539 was not duly implemented.

VIII. The Applicant further alleges that, prior to the 1992 Promotion Review Exercise, he was not fully and fairly considered for two vacant posts that were available in 1991. The Respondent contends that there was only one post available in 1991, since the other was placed at the disposal of the Secretary-General.

The Tribunal will not enter into whether this second post was or was not available. In connection with the remaining post, the Tribunal finds that the absence of a PER also affected the Applicant's prospects.

IX. The Tribunal therefore concludes that Judgement No. 539 was not duly implemented with respect to the 1992 Promotion Review Exercise. It reiterates the necessity of fully and fairly considering the Applicant as ordered in its Judgement. For this he is entitled to compensation which the Tribunal assesses at US$1,000.00.

X. The Tribunal emphasizes, however, that this proceeding, which deals solely with procedural irregularities associated with the

implementation of Judgement No. 539, concerning consideration for promotion, is wholly without prejudice to the position of either the Applicant or the Respondent concerning substantive matters regarding disputed issues of fact relating to the Applicant's performance.

XI. Accordingly, the Tribunal orders the Respondent to pay to the Applicant US$1,000.00.

All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Mikuin Leliel BALANDA
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary